MOTION FILED
JAN 27 1982

No. 80-2162

In The

Supreme Court of the United States

October Term 1981

RAMAH NAVAJO SCHOOL BOARD, INC.

and

LEMBKE CONSTRUCTION CO., INC.

Appellants,

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Appellee

ON APPEAL
FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

MOTION FOR LEAVE TO FILE BRIEF OF THE PUEBLO OF SANTA ANA AS AMICUS CURIAE, AND BRIEF OF PUEBLO OF SANTA ANA AS AMICUS CURIAE

LUEBBEN, HUGHES
& KELLY
805 Tijeras NW
Albuquerque, NM
(505) 842-6123

RICHARD W. HUGHES
805 Tijeras N.W.
Albuquerque, NM 87102
(505) 842-6123

Counsel for the
Amicus Curiae

No. 80-2162

In The

Supreme Court of the United States

October Term 1981

RAMAH NAVAJO SCHOOL BOARD, INC.

and

LEMBKE CONSTRUCTION CO., INC.

Appellants,

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Appellee

MOTION FOR LEAVE TO FILE BRIEF OF THE PUEBLO OF SANTA ANA AS AMICUS CURIAE

The Pueblo of Santa Ana, by and through its counsel, moves this Court for leave to file the attached brief as amicus curiae in this proceeding. Consent of the parties has been sought. The appellants have consented, but the appellee, New Mexico Bureau of Revenue, has refused to consent.

The Pueblo of Santa Ana ("Santa Ana") is a federally recognized Indian

tribe, situated in Sandoval County, New Mexico. Santa Ana has, for the past several years, been pursuing a policy of developing and utilizing its land and resources in ways that will yield long-term economic and social benefits to the Pueblo and its members, without impairing important cultural or environmental values. Many of the projects Santa Ana has commenced or is considering will entail substantial construction projects on the tribe's lands, and like most Indian tribes in New Mexico and elsewhere, Santa Ana will be forced by necessity to approach non-Indian firms to supply the services, including construction services, that will be needed. In times of scarce public funds and sharply rising costs, such as the present, the imposition of state gross receipts taxes on these projects can seriously affect their economic

feasibility. The effect of the New Mexico Court of Appeals decision in the instant case goes far beyond the area of school construction on the Navajo Reservation. All 22 Indian tribes in New Mexico face substantial adverse economic impacts on their development efforts, if the Court of Appeals' opinion is not reversed by this Court.

Santa Ana wishes to file its brief as amicus curiae, to point out the potentially broad impact of the Court of Appeals ruling, and to demonstrate that that ruling is completely inconsistent with decisions of this Court that reach back nearly a century and a half. Santa Ana believes that this Court's opinions in the area of state tax applicability in Indian country establish clear and consistent rules that the Court of Appeals decision has thoroughly ignored. Santa

Ana believes that no other party to this proceeding will present the broad tribal perspective that motivates Santa Ana, and that its views on the issues on this important case may be of value to this Court.

Respectfully submitted,

Richard W. Hughes
LUEBBEN, HUGHES & KELLY
805 Tijeras N.W.
Albuquerque, NM 87102
(505) 842-6123

Counsel for Amicus Curiae

DATED: January 25, 1982

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

ARGUMENT 2

I. A LONG LINE OF CASES DECIDED BY THIS COURT ESTABLISHES CONCLUSIVELY THAT STATE TAXES ARE INAPPLICABLE WITHIN INDIAN COUNTRY IF SUCH TAXES MIGHT DIRECTLY OR PROXIMATELY BURDEN SIGNIFICANT INDIAN INTERESTS. 2

II. IN LIGHT OF THE PRECEDENTS, NEW MEXICO'S ATTEMPT TO TAX LEMBKE'S PROCEEDS FOR CONSTRUCTION OF THE RAMAH SCHOOL IN THE INSTANT CASE MUST BE STRUCK DOWN. 23

A. The Court of Appeals Opinion Rests on Unsound Logic and Authorities. 24

B. Measured by the Applicable Precedents from This Court, the Tax at Issue Herein Must Fall. 36

III. CONCLUSION 43

TABLE OF AUTHORITIES

Cases:

Arizona ex rel. Merrill v. Turtle, 413 F.2d 638 (9th Cir. 1968) 4

Benally v. Marcum, 89 N.M. 463, 553 P.2d 1270 (1976) 4

Bryan v. Itasca County, 426 U.S. 373 (1976) 3

Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980) passim

City of Sault St. Marie v. Andrus, 7 Ind. L. R. 3136 (D.D.C. 1980) 4

Draper v. United States, 164 U.S. 240 (1896) 8

Eastern Navajo Industries v. Bureau of Revenue, 89 N.M. 369, 552 P.2d 805 (Ct. App. 1976), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976), cert. denied, 430 U.S. 959 (1977) 3,25

Francisco v. State, 113 Ariz. 427, 556 P.2d 1 (1976) 4

G.M. Shupe, Inc. v. Bureau of Revenue, 89 N.M. 265, 550 P.2d 277 (1976) 27,28

Howard v. Gipsy Oil Co., 247 U.S. 503 (1918) 7

TABLE OF AUTHORITIES (cont.)

Large Oil Co. v. Howard, 248 U.S. 549 (1919) 7

Maricopa & Phoenix R.R. v. Arizona Territory, 156 U.S. 347 (1895) 5,6

McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973) 3,12

Mescalero Apache Tribe v. O'Cheskey, 439 F.Supp. 1063 (D.N.M. 1977), aff'd, 625 F.2d 967 (10th Cir. 1980), cert. denied, 101 S.Ct. 1417 (1981) 27,28, 29,30, 32,33, 34,39

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) 3,12, 13,14

Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906) 7

Oklahoma v. Barnsdall Refineries, 296 U.S. 521 (1936) 7

Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949) 7

Ramah Navajo School Board, Inc. v. Bureau of Revenue, 95 N.M. 708, 625 P.2d 1225 (Ct. App. 1980), cert. quashed, 96 N.M. 17, 627 P.2d 412 (1981), cert. granted, ____ U.S. ____(1981) 24, 25,26

TABLE OF AUTHORITIES (cont.)

Santa Rosa Band v. Kings County, 532 F.2d 655 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977) 14

State v. Central Machinery Co., 121 Ariz. 183, 589 P.2d 426 (1979), rev'd, 448 U.S. 160 (1980) 11

The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) 2

Thomas v. Gay, 169 U.S. 264 (1898) passim

Tiffany Const. Co. v. Bureau of Revenue, 96 N.M. 296, 629 P.2d 1225 (1981) 23

United States v. McBratney, 104 U.S. 621 (1881) 8

United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978) cert. denied, 444 U.S. 832 (1979) 4

United States v. Rickert, 188 U.S. 432 (1903) 2

United States ex rel. Hornell v. One 1976 Chevrolet Station Wagon, 585 F.2d 978 (10th Cir. 1978) 19

Utah & N.Ry v. Fisher, 116 U.S. 28 (1885) 5,6

TABLE OF AUTHORITIES (cont.)

Wagoner v. Evans, 170 U.S. 588 (1898)	6
Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965)	passim
Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980)	12, 14, 15, 16, 21, 22
Wauneka v. Campbell, 22 Ariz. App. 287, 526 P.2d 1085 (1974)	3
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)	passim
Williams v. Lee, 358 U.S. 217 (1959)	4, 6
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)	2, 4, 5, 6, 8
Your Food Stores v. Village of Espanola, 68 N.M. 327, 316 P.2d 950 (1961)	3

Statutes:

25 U.S.C. § 231 (1976)	8
25 U.S.C. §§ 261-264 (1976)	18, 33
25 U.S.C. § 348 (1976)	8
25 U.S.C. 450(b)(c)(1980 Supp.)	24

TABLE OF AUTHORITIES (cont.)

Ariz. Rev. Stat. Ann. § 42-1309 (1956) 9

Ariz. Rev. Stat. Ann. § 42-1312 (1956) 9

N.M. Stat. Ann. § 7-9-2 (1978) 9

N.M. Stat. Ann. § 7-9-4 (1978) 9

Other Authorities:

U.S. Const., art. VII, § 8 cl. 5 11

25 C.F.R. Pt. 251 10

25 C.F.R. Pt. 252 10

Navajo Treaty of 1868, 15 Stat. 667 40, 41

No. 80-2162

In The

Supreme Court of the United States

October Term 1981

RAMAH NAVAJO SCHOOL BOARD, INC.

and

LEMBKE CONSTRUCTION CO., INC.

Appellants,

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Appellee

BRIEF OF PUEBLO OF SANTA ANA AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of the Pueblo of Santa Ana in the issues raised by this case are set forth in the Motion for Leave to File Brief as Amicus Curiae, ante at i-iv.

SUMMARY OF ARGUMENT

In Thomas v. Gay, 169 U.S. 264 (1898), this Court established the principle governing the imposition of state taxes on non-Indians in Indian country. Under Thomas, only when the tax at issue poses no direct or substantial burden on Indian interests will it be allowed. More recent cases indicate that the burdened Indian interest must be "significant" to warrant avoidance of the tax, Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 155 (1980), but that a showing of strong federal concern with the burdened interest will, alone, establish the Indian interest as sufficiently "significant" to preempt any state taxation. Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965); White Mountain Apache Tribe v. Bracker, 448

U.S. 136 (1980); Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980).

In the instant case, the state taxes directly and substantially burdened the Ramah School Board's effort to provide adequate education for Navajo youth. They also constituted a direct burden on business activity with Indians in Indian country. Under an unbroken line of authority in this Court, the taxes must be struck down.

The opinion of the court below rests on reasoning and case law directly contrary to the principles of Thomas v. Gay, Warren Trading Post, White Mountain Apache and Central Machinery, and a major element of that opinion's reasoning, its reliance on the "legal incidence" of the tax, has been specifically rejected by this Court as being of any relevance in this context. Central Machinery, 448 U.S. at 164, n. 3.

ARGUMENT

I. A LONG LINE OF CASES DECIDED BY THIS COURT ESTABLISHES CONCLUSIVELY THAT STATE TAXES ARE INAPPLICABLE WITHIN INDIAN COUNTRY IF SUCH TAXES MIGHT DIRECTLY OR PROXIMATELY BURDEN SIGNIFICANT INDIAN INTERESTS.

In the first case to reach this Court involving the applicability of state law within Indian country, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), this Court held, in a seminal opinion by Chief Justice Marshall, that within the bounds of the Cherokee territory, "the laws of Georgia can have no force." Id. at 561. Consistent with that unambiguous doctrine, this Court has repeatedly struck down efforts by states to tax Indians or their property located within Indian country. The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) (real property tax on trust lands); United States v. Rickert, 188 U.S. 432

(1903) (tax on Indian allotted land, and improvements and personalty thereon); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973) (personal income tax on income earned on reservation); Bryan v. Itasca County, 426 U.S. 373 (1976) (personal property tax on on-reservation property); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) (personal property tax, cigarette vendor's license fees, and cigarette sales tax on sales to Indian purchasers by Indian seller).[1/]

1/ Other federal courts and state courts alike, including courts of New Mexico, have similarly struck down a variety of efforts by states to tax and regulate Indians in Indian country. Eastern Navajo Industries v. Bureau of Revenue, 89 N.M. 369, 552 P.2d 805 (Ct. App. 1976), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976), cert. denied, 430 U.S. 959 (1977) (gross receipts tax on sales by Indian corporation); Wauneka v. Campbell, 22 Ariz. App. 287, 526 P.2d 1085 (1974) (state financial responsibility law); Your Food Stores v. Village of Espanola, 68 N.M. 327, 361 P.2d 950

As Justice Black observed in Williams v. Lee, 358 U.S. 217, 219 (1959), however, "[o]ver the years this Court has modified [Worcester's] principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized." Unquestionably, the area in which the Worcester rule has been most drastically altered is that of state legislative power over non-Indians within Indian

1/ (cont.) (1961) (annexation of tribal trust land by municipality); Benally v. Marcum, 89 N.M. 463, 553 P.2d 1270 (1976) ("hot pursuit" doctrine); Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1968) (state extradition laws); Francisco v. State, 113 Ariz. 427, 556 P.2d 1(1976) (authority of sheriff to serve process); Santa Rosa Band v. Kings County, 532 F.2d 655 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977) (county zoning ordinance); City of Sault St. Marie v. Andrus, 7 Ind. L.R. 3136 (D.D.C. 1980) (city land use ordinances); United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978), cert. denied, 444 U.S. 832 (1979) (liquor regulation).

country, the issue presented by the instant appeal.

The earliest such "modification" of Worcester in this area came in Thomas v. Gay, 169 U.S. 264 (1898), in which this Court considered the validity of a state tax on cows owned by non-Indians but grazed on Indian land under a federally-approved grazing lease. While conceding that the imposition of the tax might affect the value of the grazing lease to the Indian owner, this Court nonetheless viewed this possible burden on Indian interests as "too remote and indirect" to intrude impermissibly on Congress' power over Indian Affairs.[2/]

2/ Id. at 275. Thomas relied in part upon Utah & N.Ry v. Fisher, 116 U.S. 28 (1885), and Maricopa & Phoenix R.R. v. Arizona Territory, 156 U.S. 347 (1895), both of which sustained the validity of territorial taxes on railroads passing through Indian reservations. In each of those cases, however, this Court's reasoning in upholding the challenged tax was ultimately bottomed on its view that

And see Wagoner v. Evans, 170 U.S. 588 (1898), in which this Court reached the same conclusion on similar facts. Thomas v. Gay thus gave rise to an important but, as the instant case suggests, debatable exception to Worcester's absolute prohibition on the application of state law within Indian country. Under Thomas, states may tax (and, perhaps, otherwise regulate) non-Indians

---

2/ (cont.) the railroad right-of-way was no longer a part of Indian country. As this Court stated in Fisher, the cession of the necessary land by the tribe, and Congress' confirmation of the grant to the railroad, withdrew the land from the reservation, such that the road and the facilities therein "became subject to the laws of the Territory relating to railroads, as if the reservation had never existed." 116 U.S. at 32 (emphasis added). See also Maricopa & Phoenix R.R. v. Arizona Territory, 156 U.S. 347, 351 (1895). It would seem, thus, that these cases provide no useful authority for state taxation of non-Indian property within Indian country, although they are sometimes cited in that context. See, e.g., Williams v. Lee, 358 U.S. 217, 220 (1959).

or their property within Indian country, but only so long as no substantial or direct burden is thereby imposed on Indian interests.[3] That doctrine still

---

3/ Thomas was followed in Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906), in which the county had assessed a property tax on cattle that were maintained by a Jesuit mission on the Flathead Reservation, largely for purposes related to the Mission's charitable enterprises. This Court affirmed the lower court's dismissal of a challenge to the tax for lack of jurisdiction, and observed that "the Indians' interest in this kind of property, situated on their reservations, [is] not sufficient to exempt such property, when owned by private individuals, from taxation." Id. at 128-29. The Court also rejected the suggestion that the Mission was entitled to exemption as an instrumentality of federal policy. The "federal instrumentality" argument eventually led to a series of decisions holding that non-Indian lessees of Indian mineral interests were, in effect, instrumentalities of federal policy promoting development of Indian resources, and that under the doctrine of intergovernmental tax immunity, the proceeds were immune from state taxation. See, e.g., Oklahoma v. Barnsdall Refineries, 296 U.S. 521 (1936); Large Oil Co. v. Howard, 248 U.S. 549 (1919); Howard v. Gipsy Oil Co., 247 U.S. 503 (1918). That line of cases was overruled in Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949).

stands as the sole justification for the existence of any state legislative power within Indian country, except where Congress has expressly authorized the exercise of such power.[4/]

Not until this Court's decision in Warren Trading Post v. Arizona Tax Comm'n., 380 U.S. 685 (1965), however, was it certain that the Thomas exception to Worcester was not open-ended. Arizona asserted in Warren Trading Post that it could impose its transaction privilege tax[5/] on the sales of a

---

4/ See, e.g., 25 U.S.C. §348 (1976), which provides that inheritance of interests of allotments be governed by state law; 25 U.S.C. §231 (1976), providing for enforcement of state sanitation and quarantine laws, and compulsory education laws where the tribe consents.

Relying on a rationale similar to that applied in Thomas, this Court has also allowed states to exercise criminal jurisdiction over non-Indians who commit crimes against non-Indians within Indian country. United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896).

5/ The Arizona transaction privi-

federally licensed non-Indian trading post, located on the Navajo Indian Reservation, to reservation Indians. This Court rejected that contention, despite the fact that under the Arizona law, the tax fell on the non-Indian seller, not the purchaser. Inasmuch as the tax would routinely be passed on to the Indian buyer, it was neither a "remote" nor an "indirect" burden on the Indian, quite unlike the property tax on non-Indian-owned cows allowed in Thomas. This Court pointed out at length in Warren Trading Post that from the earliest days of the republic, Congress had exercised its power to regulate the activities of non-Indians who engage in

---

5/ (cont.) lege tax is the equivalent of the New Mexico gross receipts tax, the tax at issue in the instant case. Compare Ariz. Rev. Stat. Ann. §§42-1309, 42-1312 (1956), with N.M. Stat. Ann. §§7-9-2, 7-9-4 (1978). Such a tax is commonly called a "sales tax."

businesses with reservation Indians, and that such regulation had extended even to determining "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." Id. at 689. Further, this Court noted the extensive regulations promulgated by the Secretary of the Interior pursuant to Congressional authority, at 25 C.F.R. Pts. 251, 252, governing reservation business practices. This Court held that Congress had dealt so comprehensively with the subject of business practices in Indian country "that no room remains for state laws imposing additional burdens on traders." Warren Trading Post, 380 U.S. at 690.

This passage from Warren Trading Post is often cited as the origin of the so-called "federal preemption" tests for determining the extent of state

power over non-Indians in Indian country.[6/] Equally important, however, is the opinion's focus on the directness and substantiality of the burden that application of the state tax to the trader would impose on Indians, the basis of the reasoning in Thomas v. Gay. In Warren Trading Post, the Court's "preemption" language, in the opinion's discussion of Congress' regulation of reservation business, provides a means of spotlighting the importance of the Indian interests being imposed upon by the state tax (i.e., Indian commerce, an area that the Constitution explicitly reserves to congressional control, U.S. Const., art. VII, §8, cl. 5). To view the case narrowly as a "federal preemption" case is to miss its place in the mainstream

---

6/ See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

of cases dealing with state power in Indian country.[7/]

The next two occasions this Court had to consider state power over non-Indians in Indian country also came in the context of state sales taxes, but as applied to sales by Indian sellers to non-Indian buyers. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S.463 (1976), and Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980), both dealt with on-reservation "smoke-shops", which had become popular revenue-raising devices for Indians because of their putative exemption from heavy state

---

7/ In McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 170 n.6 (1973), this Court stated that "the reasoning of Warren Trading Post cannot be so restricted [to a "preemption" analysis]," and that the result there also derived from the longstanding congressional policy of leaving reservation Indians free from state control.

cigarette taxes. In both decisions, however, this Court upheld the full range of state sales taxes and record-keeping requirements as applied to sales to non-Indians, thus effectively wiping out the price advantage the smokeshops had enjoyed over off-reservation cigarette vendors.

This Court's analysis in both cases began with the assumption that state sales taxes could validly be applied to sales to non-Indians, unless the imposition of the taxes could be shown to burden the Indian seller. In Moe, this Court placed considerable weight on the fact that the Montana tax law at issue laid the obligation to pay the tax directly on the ultimate consumer. The opinion viewed the only burden on the Indian seller to be that of collecting the tax for the state, a burden the

Court felt was "minimal." 425 U.S. at 483. The decision did not discuss the fact that enforcement of the tax eliminated the seller's price advantage with respect to cigarette sales to non-Indians.

The four tribes involved in Colville had passed their own cigarette sales tax ordinances, which had been approved by the Secretary of the Interior. They argued that those enactments preempted the state taxes. They had also made an extensive record on the economic importance of the smokeshops, as principal contributors to tribal revenue. This Court thus was obliged to address squarely the contention that application of the state tax would directly and substantially burden tribal economic interests. The Colville opinion's treatment of that argument added another element to the analysis of when state law

may apply to non-Indians in Indian country. While this Court acknowledged that the tribes had a legitimate interest in raising revenue, it viewed that interest as "strongest when the revenues are derived from value generated on the reservation by activities involving the tribes and when the taxpayer is the recipient of tribal services." 447 U.S. at 156-57. This Court noted that the smoke-shops owed their existence solely to their ability to market the supposed exemption from state taxes, not to any value "generated on the reservation by activities in which the tribes have a significant interest," id. at 155, and it was not inclined to permit the Indian country immunity from state law to be exploited for such bald economic purposes. Colville indicates that only burdens on those Indian interests that may be

regarded as "significant" will justify exemptions from state taxation of non-Indians in Indian country.

Two decisions that followed Colville by just a few months, however, indicated that, just as in Warren Trading Post, a substantial showing of congressional concern with the subject matter of the asserted state tax will, without more, sufficiently establish the "significance" of the Indian interest to preclude application of the tax.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), was a challenge to the imposition of state motor carrier license taxes and use fuel taxes on a non-Indian logging company doing business entirely on the White Mountain Apache Reservation, under contract with the tribal timber enterprise. This Court recounted at great length the nature and scope of federal regulation

and management of the timber harvesting process, and concluded that "the present case . . . is in all relevant respects indistinguishable from Warren Trading Post." Id. at 152-53. The pervasive federal involvement in the activity, the absence of any state responsibility, and the federal policy of leaving the tribe "'largely free to run the reservation and its affairs without state control,'" id. at 152 (quoting from Warren Trading Post, 380 U.S. at 690), precluded the application of the challenged state taxes.

The second case, Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980), like Warren Trading Post, involved the applicability of the Arizona Transaction privilege tax[8/] to on-reservation sales of goods by a non-Indian seller to an Indian buyer. There,

8/ See n. 5, supra.

however, the similarities between Central Machinery and Warren Trading Post ended. Central Machinery Co. was an off-reservation business, with neither a permanent place of business on the reservation nor a federal Indian Trader's license. The buyer, moreover, was not an individual Indian, but a tribal farming enterprise, which had purchased eleven farm tractors from the company. The Arizona Supreme Court had viewed those factors as sufficient to distinguish the case from Warren Trading Post, and it upheld the tax. State v. Central Machinery Co., 121 Ariz. 183, 589 P.2d 426 (1979), rev'd, 448 U.S. 160 (1980).

This Court, however, again saw Warren Trading Post as controlling, and viewed the factual differences as inconsequential to the outcome. The Indian trader statutes, 25 U.S.C. §§261-264 (1976), "plainly" governed the trans-

action, this Court said, and the company's failure to have a trader's license was irrelevant since it is "the existence of the Indian trader statutes . . . and not their administration, that pre-empts the field of transactions with Indians occurring on reservations." 448 U.S. at 165 (1980). The opinion reasoned that to exempt the transaction because the seller had no place of business on the reservation would conflict with congressional intent and open the door to easy circumvention of the statutory scheme. Ibid.[9/] This Court further specifically rejected the relevance of Arizona's argument that the "legal incidence" of the Arizona tax was on the non-Indian seller, not the buyer. Id. at 164, n. 3. In Central Machinery

9/ Accord, United States ex rel. Hornell v. One 1976 Chevrolet Station Wagon, 585 F.2d 978, 980-81 (10th Cir. 1978).

as in Warren Trading Post, the tax, if applied, would ultimately be borne by the Indian consumer.

Santa Ana urges that this considerable body of precedent, from Thomas v. Gay to Central Machinery, establishes a clear and consistent method of analysis for determining when state law may validly be imposed on non-Indians, their property or transactions, within Indian country, and that that analysis points easily to the proper result in the instant appeal. Such an analysis must begin with the question posed by Thomas v. Gay: does the application of the state law result in a direct or substantial burden on any Indian interest? If no Indian interest is so burdened, then under Thomas, there can be no objection to application of the state law. If there is some palpable burden on Indian interests, however,

then one must take a second step, to examine the tribal, state and federal interests involved, in the manner suggested by Warren Trading Post and Colville.

As for the second step of this analysis, Warren Trading Post establishes that where Congress, in the exercise of its special power in Indian affairs, has demonstrated clear federal concern for the burdened Indian interest, that alone will oust any state regulatory power at all. This doctrine has been referred to as the "federal preemption" test. Where the federal interest in the subject matter is less clear or absent, however, one must examine the tribal interest itself, and determine whether it is sufficiently "significant," within the meaning of Colville, to warrant an immunity from state law.

Central Machinery and White Mountain Apache both spoke in "preemption" terms, because of the evident federal concern in the areas of harvesting of Indian timber and business practices in Indian country. "Preemption," however, in this context amounts to a weighing of interests, in which strong federal concern outweighs virtually any state interest in the same activity. Had there been no clear federal concern in those two cases, however, this Court might have looked to the tribal interests in the affected activity. Were, for example, the interests of the White Mountain Tribe in the economic viability of its timber enterprise deemed "significant" in Colville's terms, the outcome of the case should be the same even without the extensive federal regulation of

the activity.[10]

II. IN LIGHT OF THE PRECEDENTS, NEW MEXICO'S ATTEMPT TO TAX LEMBKE'S PROCEEDS FOR CONSTRUCTION OF THE RAMAH SCHOOL IN THE INSTANT CASE MUST BE STRUCK DOWN.

Seen against this backdrop of authority, it seems certain that the opinion of the New Mexico Court of Appeals in the instant case must be disapproved, and the tax at issue herein held inapplicable to the proceeds derived by appellant Lembke for construction of

---

10/ In White Mountain Apache, 448 U.S. at 145, this Court stated that cases of this sort will always require a "particularized inquiry into the nature of the State, Federal and tribal interests at stake," suggesting that the existence of a "significant" tribal interest may not, alone, be enough to oust state regulation. The passage indicates an approach that would weigh competing interests, as advocated by the dissent in Tiffany Const. Co. v. Bureau of Revenue, 96 N.M. 296, 629 P.2d 1225, 1231 (1981) (Sosa, J., dissenting), a case raising virtually the same issue as that presented here.

the Ramah School.

A. The Court of Appeals Opinion Rests on Unsound Logic and Authorities

It is undisputed that Lembke, a non-Indian company, performed the services to which the challenged taxes pertain, entirely within Indian country, on tribal trust land on the Ramah Navajo Reservation (a satellite of the Navajo Reservation) in west-central New Mexico. Jurisdictional Statement at 15. The work was performed under a contract with appellant Ramah Navajo School Board, Inc. ("the Board"), which under federal law is deemed to be a "tribal organization." 25 U.S.C. §450b (c) (1980 Supp.); Ramah Navajo School Board, Inc., v. Bureau of Revenue, 95 N.M. 708, 625 P.2d 1225, 1227 (Ct. App. 1980), cert. quashed, 96 N.M. 17, 627 P.2d 412 (1981), cert. granted, _____

U.S. ____(1981).[11/] The Board in turn was under a contract with the Bureau of Indian Affairs. The State of New Mexico taxed Lembke's gross receipts under its contract with the Board, and the Board, as that contract required, reimbursed Lembke in full for the amount of the taxes assessed. 625 P.2d at 1227. As the Court of Appeals candidly observed, "the ultimate economic burden was on the School Board." Ibid. Yet that Court sustained the tax. Santa Ana submits that the reasoning of the Court of Appeals, and the authorities upon which it relied, must be disapproved by this

---

11/ The Board is incorporated under New Mexico law as a non-profit organization, but its membership consists entirely of Navajo Indians from the Ramah "Chapter," or community. Ramah Navajo, 625 P.2d at 1227. Under New Mexico case law, a state-chartered corporation that is predominantly Indian-owned is considered an Indian for purposes of considering jurisdictional issues such as this one. Eastern Navajo Industries v. Bureau of Revenue, 89 N.M. 369, 552 P.2d

Court.[12]

The Court of Appeals emphasized repeatedly throughout its opinion that under New Mexico law, the gross receipts tax has its legal incidence on the (non-Indian) seller, not the buyer (the Board). This Court, however, has specifically rejected the notion that such an argument has any relevance to the outcome of cases such as this. Central Machinery at 164, n. 3. Far more pertinent to this case is the Court of Appeals' concession, noted above, that "the ultimate economic burden" of the tax fell on the Board. Ramah Navajo, 625 P.2d at 1227.

The Court of Appeals relied heavily for its decision below on one of its own

---

11/ (cont.) 805, 809 (Ct. App. 1976), cert. denied., 90 N.M. 7, 558 P.2d 619 (1976), cert. denied, 430 U.S. 959 (1977).

12/ Santa Ana takes no position on the second part of the Court of Appeals opinion, dealing with the interpretation of specific provisions of New Mexico's

prior decisions, G.M. Shupe, Inc., v. Bureau of Revenue, 89 N.M. 265, 550 P.2d 277 (1976), and on a federal case that also arose in New Mexico, Mescalero Apache Tribe v. O'Cheskey, 439 F. Supp. 1063 (D.N.M. 1977), aff'd, 625 F.2d 967 (10th Cir. 1980), cert. denied, 101 S. Ct. 1417 (1981). Shupe was a challenge to gross receipts taxes assessed against a contractor on its proceeds from the construction of a dam on the Nambe Indian Reservation in New Mexico. The project was built under a contract with the Bureau of Reclamation, not the Bureau of Indian Affairs. The tribe had no involvement in the project, and was not at all burdened by the tax, and from all that appears, the tax in Shupe would be entirely proper under the Thomas v. Gay

---

12/ (cont.) tax statutes, and that aspect of the court's ruling is not at issue in this appeal.

exception to Worcester. The extensive Indian law discussion in Shupe, thus, seems to be entirely beside the point, and the opinion cannot be regarded as good authority for a case such as this one, where the tax burden falls entirely on an Indian entity.

The two lower court opinions in Mescalero are, admittedly, more on point. That case involved the applicability of gross receipts taxes assessed against the proceeds of construction of a resort complex on the Mescalero Apache Reservation in southern New Mexico, by non-Indian firms under contract with the Mescalero Tribe. Although this Court declined to review the decision of the Tenth Circuit, upholding the tax, it is difficult to reconcile that decision (or that of the district court, which the Tenth Circuit affirmed) with the line of

authorities discussed above in §I. And even if Mescalero were thought to be sound, its facts differ from those in the instant case in one important respect that alone ought to preclude its justifying the result reached by the court below.

Nearly all of the contractors in Mescalero had been issued federal Indian Traders' licenses by the Bureau of Indian Affairs, but the district court held the issuance of those licenses to have been beyond the government's power, and thus void. The court viewed the contractors as beyond the reach of the trader statutes, mainly because they had no permanent places of business on the reservation and because their services were sold to the tribe pursuant to complex, sophisticated contracts negotiated by attorneys and tribal and BIA officials. 439 F. Supp. at 1067-68. Although it acknowledged that the state taxes would

be passed on to the tribe, the court noted that the legal incidence of the tax was on the non-Indian contractors, not the tribe. The court characterized the economic burden on the tribe as "indirect," citing Thomas v. Gay. The Tenth Circuit opinion added nothing significant to the district court's reasoning, and affirmed it on all points.[13/]

On both questions decided - whether the Indian trader statutes could cover the transactions at issue, and whether imposition of the state taxes would, regardless, constitute an impermissible burden on significant Indian interests - the opinions in Mescalero appear to run directly contrary to relevant decisions of this Court. The district court's rationale for voiding the licensing of the contractors under the trader statutes

13/ Judges Doyle and McKay filed vigorous dissents.

was expressly disapproved by this Court in Central Machinery, 448 U.S. at 164-65, as was any reliance on the mechanical notion of "legal incidence" analysis. Id. at 164, n. 3.[14/] Warren Trading Post, Central Machinery and White Mountain, moreover, all are premised on the very sensible proposition that a tax on a transaction with an Indian buyer, that the seller will routinely pass on to the buyer as part of the buyer's cost, cannot be characterized as an "indirect" burden on the Indian within the meaning of Thomas v.

14/ The irrelevance of the "legal incidence" of the tax is likewise demonstrated in White Mountain Apache, where this Court struck down taxes that unquestionably were assessed solely against the non-Indian company. The opinion's analysis proceeds on the logical premise that such taxes would routinely be passed along to the ultimate purchaser, in that case the tribal timber enterprise, and would thereby directly burden the Indian entity. 448 U.S. at 148-50.

Gay.[15] The burden is direct, proximate, and substantial.

White Mountain and Central Machinery were decided shortly after the Tenth Circuit decision in Mescalero, and the tribe sought rehearing, arguing that the two new decisions by this Court compelled a reversal of the reasoning of Mescalero. The Tenth Circuit denied rehearing in a short opinion, in which it primarily made the point that Central Machinery dealt with a sale of "goods," while Mescalero was concerned with sales of "services". With that distinction, the court felt no need to change its earlier view of the case before it. 625 F.2d at 990.

15/In Thomas, the burden on the Indian that might have resulted from the property tax on the non-Indian cows could properly be described as "indirect" and "remote," because it merely affected the non-Indian lessee's opinion of how valuable the Indian grazing lease was to him. 169 U.S. at 273. There was no way the Indian lessor would ever have to bear the tax directly, as there is in Mescalero and in the instant case.

It is true that the Indian trader statutes frequently refer to introduction of "goods" into Indian country, see, e.g. 25 U.S.C. §§261,263,264 (1976). The statutes also refer to "trading" with the Indians, however, id. §§261-264, a term that could embrace the full scope of business dealings with ultimate consumers. Given the stated motivations behind those enactments, see Warren Trading Post, 380 U.S. at 688-690; Central Machinery, 448 U.S. at 163-65, there would seem to be little basis for distinguishing goods from services, if both could reasonably fall within the statutory terms. And that distinction in no way speaks to the matter of the burden imposed on the tribe by the taxes at issue.

There is, moreover, a significant distinction to be drawn between the facts in Mescalero and the facts of the instant

case, that would lead to disapproval of the taxes here even if Mescalero were correct. The construction project on which the taxes were assessed in Mescalero was a commercial undertaking, a luxury resort complex. Arguably, the tribe could pass the tax burden along to patrons of the resort, by raising its prices, and the tax might thus be regarded as imposing only the "indirect" burden on the tribe of making its resort that much less attractive to potential patrons. Santa Ana does not fully subscribe to that argument, however, for it ignores the fact that for many tribes, which have little or no potential tax base, commercial enterprises are of critical importance as the only means by which tribes can survive and function as viable governmental entities. Any burden on the profitability of such enterprises,

thus, directly affects the life-blood of tribal government itself. Cf. White Mountain Apache Tribe, 448 U.S. at 149 (imposition of taxes there at issue would frustrate federal policy of encouraging tribes to "revitalize their self-government"). Only where the factual record in a particular case showed that for the tribal enterprise to pass along a state tax would cause no effect on tribal revenues, should the above argument be adopted to justify the imposition of the state tax.

In the instant case, however, no such argument is available to the state. A public school board may not"pass along" taxes or other costs to anyone. Indeed, where any normal governmental function is involved, whether it be building or operating schools, building or maintaining roads or other public works, or providing other public

services, it is axiomatic that any addition to the cost of such activity constitutes a direct burden on the governmental entity at least equal in magnitude to the amount of the added cost. That certainly is what is shown by the record in the instant case.

In short, the authorities on which the court below founded its affirmance of the tax at issue here, do not warrant that court's confidence, or this Court's approval.

B. Measured by the Applicable Precedents From This Court, the Tax at Issue Herein Must Fall.

It having been shown that the reasoning of the opinion below is unsound, it remains only to demonstrate that when analyzed in accordance with the relevant decisions of this Court, as discussed, supra, in §I, the tax at issue in the instant case cannot be sus-

tained.

The initial question to be posed is whether imposition of the tax directly burdens any Indian interest. As suggested supra, pp. 31-32, the answer to that here, particularly in light of Warren Trading Post, White Mountain Apache and Central Machinery, must be in the affirmative. The taxes were passed on by Lembke directly to the Board, in the amount of at least $232,000.00. Jurisdictional Statement at 16. The record suggests that had that money not gone to reimburse Lembke for state taxes, the Board could have constructed other badly needed facilities for which it otherwise has no funds, such as a cafeteria, administrative offices, or additional classrooms. Id. at 17. The Board has been forced to pay the taxes, however, and the Ramah community is still

lacking in necessary school facilities as a result. That the taxes have imposed a direct burden, in Thomas' terms, is indisputable.

The second stage of inquiry looks to the nature of the interest impaired. Santa Ana submits that even were there no demonstrable federal concern with the taxed transaction that would, alone, oust the state from taxing power (which there is, see infra, at 39-41), the Indian interest here, by itself, would be sufficient to preclude application of the tax. That interest is the especially vital one of locally controlled education of Indian youth, in suitable physical facilities. Particularly where the State plays no role in providing that education,[16/] there can be no justification

16/ Indeed, it was the State's closing of a state-run high school at Ramah that prompted the community to organize its own school with federal assistance. Jurisdictional Statement at 15.

for the state to impair the Board's efforts to do so by levying state taxes on school construction.

In the instant case, however, this Court need not reach that issue, because congressional concerns for the Indian interests at stake here are self-evident, and these concerns should here, as in Warren Trading Post, White Mountain Apache and Central Machinery, be held to "preempt" any state taxation at all. There are two areas of clear federal concern: business activities in Indian country, and Indian education. Either should suffice to meet the test of the cited cases.

As for the first, the area of business practices, it is true that Lembke did not have a federal Indian Trader's license, but there is no apparent reason why it could not have obtained

one, nothwithstanding Mescalero. As the appellants have moreover pointed out, like the tractor purchase in Central Machinery, the construction of the Ramah School was subject to on-going BIA involvement and supervision. Jurisdictional Statement at 15-16, esp. n. 5. If Lembke's sales of goods and services to the Board can be said to be within the scope of the Indian trader statutes, 25 U.S.C. §§261-264, then this case must be controlled by Central Machinery, and the tax must be invalidated.[17/]

Federal concern in the second area, education for Navajos and other Indians, has been apparent at least from the signing of the Navajo Treaty of 1868, 15 Stat. 667, by section 6 of which the United States agreed to provide schools

17/ Central Machinery would, in fact, seem to require that no commercial sale to Indians or Indian entities in Indian country may be taxed by a state.

and teachers for all those Navajo children who could be "induced or compelled" to attend. Id. at 669. The extensive congressional legislation and regulations of the Department of the Interior that deal with Indian education generally, and with the construction of the Ramah School specifically, are detailed in the appellants' brief herein, and will not be reiterated here. It would appear, however, that federal concern in this area is more than sufficient to justify the preemption doctrine as to any state laws that burden Indian education. At a minimum, the taxes here at issue should be disapproved on that ground.

However the question is analyzed, the unavoidable conclusion must be that the State's effort to tax Lembke's receipts from construction of the Ramah School cannot be upheld in the face of

the unbroken line of decisions from this Court that have been reviewed above. Santa Ana would urge this Court to reaffirm that line of precedent, in terms, as suggested in the foregoing, that would preclude any justification for further costly and wasteful litigation in this area. In particular, this Court should reaffirm the principle of Thomas v. Gay, that a state may tax non-Indians or their property in Indian country only where the imposition of such a tax will not directly or substantially burden any significant Indian interest. That fundamental doctrine has obviously been ignored by the court below. Firm adherence to that doctrine by this Court will not only fairly serve the legitimate interests of Indian people and their governmental institutions, but will also undoubtedly promote greater mutual respect between Indian

tribes and the several states.

III. CONCLUSION

For the foregoing reasons, amicus curiae Pueblo of Santa Ana respectfully urges this Court to reverse the decision of the New Mexico Court of Appeals below, and direct that the challenged taxes be refunded to appellant Lembke.

Respectfully submitted,

LUEBBEN, HUGHES,
& KELLY
805 Tijeras NW
Albuquerque, NM
(505) 842-6123

Richard W. Hughes
805 Tijeras N.W.
Albuquerque, NM 87102
(505) 842-6123

Counsel for Amicus Curiae
Pueblo of Santa Ana